

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 14, 2006

STATE OF TENNESSEE v. DOUGLAS SIMS

**Direct Appeal from the Criminal Court for Hamblen County
No. 05CR217 James E. Beckner, Judge**

No. E2006-00380-CCA-R3-CD - Filed February 15, 2007

A Hamblen County Criminal Court jury convicted the appellant, Douglas Sims, of aggravated robbery, and the trial court sentenced him to sixteen years in confinement. The victim did not testify at trial. On appeal, the appellant claims that the trial court's allowing the State to introduce a transcript of the victim's preliminary hearing testimony into evidence violated his constitutional right to confrontation. Upon review of the record and the parties' briefs, we conclude that the appellant is not entitled to relief and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Wayne R. Stambaugh, Morristown, Tennessee, for the appellant, Douglas Sims.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; C. Berkley Bell, District Attorney General; and Victor Vaughn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The proof at trial revealed that in the early morning hours of January 20, 2005, the appellant robbed Francisco Pardon in a laundromat. The appellant threatened the victim with a knife, cut the victim's chest, and took thirteen one-hundred-dollar bills from him. The appellant was arrested about one and one-half hours later, waived his constitutional rights, and gave two statements to the police. At first, the appellant denied any involvement with the crime. However, he later admitted that he robbed the victim and "nicked him to let him know I was for real." The jury found the appellant guilty of aggravated robbery, a Class B felony, and the trial court sentenced him as a Range II, multiple offender to sixteen years in confinement.

II. Analysis

The victim did not testify at trial, and the appellant claims that the trial court erred by allowing the State to introduce the victim's preliminary hearing testimony into evidence. Specifically, he contends that the admission of the victim's preliminary hearing testimony violates his constitutional right to confrontation. The State argues that the appellant has waived this issue and that, in any event, the appellant's right to confrontation was not violated because he had the opportunity to cross-examine the victim at the preliminary hearing. We conclude that the State's introducing the victim's preliminary hearing testimony into evidence did not violate the appellant's right to confrontation and that, in any event, the error was harmless.

At the appellant's preliminary hearing, the appellant cross-examined the victim about the time of the offense, the amount of money he had with him at the laundromat, and his injuries. When the defense asked the victim if he had a copy of his work schedule, the trial court stated, "This is a preliminary hearing. I don't care about [the victim's] work schedule." The appellant's attorney then asked the victim, "Well, let me just get it right down to the point. Had you been using cocaine that night with [the appellant]?" The victim answered no, and the defense continued cross-examining the victim.

Prior to trial, the appellant learned that the victim would not testify at trial and that the State intended to introduce the victim's preliminary hearing testimony into evidence. The appellant filed a motion to exclude the victim's preliminary hearing testimony, arguing that the testimony was hearsay and violated the Confrontation Clause of the United States Constitution. The appellant stated in his motion that he had not been provided with any discovery material before the preliminary hearing and, therefore, had been unable to question the victim about key pieces of evidence such as police photographs of the victim's injuries and the victim's statement to police.

The trial court held a hearing on the appellant's motion, but no transcript of the hearing or written order overruling the appellant's motion has been included in the appellate record.¹ Nevertheless, at trial, the trial court made the following comments regarding its ruling on the motion:

We've already looked fairly intensely at the admissibility of the transcript of the preliminary hearing. It was a situation where the defendant was present, the victim was present, the State was there prosecuting, the defendant's lawyer was present, [and] the alleged victim in the case was under oath testifying subject to cross examination. The cross examination was not just casual. It was detailed and articulate and, quite frankly, a good job done by defense

¹ We note that the State's brief repeatedly refers to the motion hearing as a "suppression hearing." However, the appellant's pretrial motion was not a motion to suppress. See State v. Cook, 9 S.W.3d 98, 101 (Tenn. 1999) (defining a motion to suppress).

counsel]. [The general sessions court] did limit it in some respects.

....

This Court's previously held that it meets all of the qualifications where a witness is not available and by due diligence cannot be -- his presence could not be obtained by the State. And he was in a proceeding where he was subject to cross examination, examination under oath and in a court of law. The law does allow that testimony to be admitted.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Generally, hearsay statements are inadmissible unless they fall under one of the recognized exceptions to the hearsay rule. Tenn. R. Evid. 802. Although the victim's preliminary hearing testimony was hearsay, in limited circumstances, prior testimony may be admissible at trial via a hearsay exception if the declarant is unavailable and if the party against whom the testimony is offered had an opportunity and a similar motive to develop the testimony through methods such as cross-examination. Tenn. R. Evid. 804(b)(1). A "preliminary hearing transcript is precisely the type of former testimony contemplated under [Rule 804(b)(1)]." State v. Michael Dwayne Hatfield, No. 03C01-9307-CR-00233, 1994 Tenn. Crim. App. LEXIS 190, at *10 (Tenn. Crim. App., at Knoxville, Mar. 29, 1994); see Tenn. R. Evid. 804(b)(1), Advisory Commission Comments.

_____The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" and Article I, Section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused hath the right to . . . meet the witnesses face to face." In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the Supreme Court examined the right to confrontation. The court summarized the factual basis of the case by saying, "Petitioner . . . stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination." 541 U.S. at 38, 124 S. Ct. at 1356-57. The court held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68, 127 S. Ct. at 1374.

Turning to the instant case, we will first address the State's waiver argument. The State contends that the appellant waived this issue because he failed to include the motion hearing transcript in the appellate record. According to the appellant's brief, the defense requested that the trial court provide a court reporter for the motion hearing, but the trial court denied the request. Tennessee Rule of Criminal Procedure 12(g) provides that a "verbatim record shall be made of all proceedings at [a] motion hearing, including any findings of fact and conclusions of law that are made orally." Therefore, we are perplexed as to why there was not some form of a verbatim record from which a written transcript of the hearing could have been prepared. At the very least, the

appellant should have submitted a statement of the evidence with the record. See Tenn. R. App. P. 24(c) (providing that “[i]f no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant’s recollection”). Accordingly, this issue could be treated as waived. However, given that the appellant does not contest the trial court’s finding regarding the victim’s unavailability and that the trial court gave a brief explanation at trial for its decision to deny the appellant’s motion, in the interests of justice, we will address the merits of this issue.

The appellant argues that he was not allowed to question the victim fully at the preliminary hearing. However, the trial court concluded that the defense’s cross-examination of the victim was detailed and articulate. Although the trial court noted that the general sessions court limited counsel’s cross-examination of the victim “in some respects,” the court ultimately refused to hold that Crawford’s prior opportunity for cross-examination requirement was not met. Upon our review of the preliminary hearing transcript, we conclude that the trial court did not abuse its discretion by denying the appellant’s motion to exclude the transcript from evidence at trial. See State v. Summers, 159 S.W.3d 586, 597 (Tenn. Crim. App. 2004) (analyzing error in the admissibility of 804(b)(1) former testimony under an abuse of discretion standard). The appellant thoroughly questioned the victim about his activities on the night of the crime and why he had a large amount of money with him. After the trial court stated that it did not care about the victim’s work schedule, the appellant’s attorney stated that he was going to get to the point and asked the victim if he had been using cocaine with the appellant prior to the robbery. The victim said no, and the appellant continued questioning him. We do not believe the trial court erred by admitting the preliminary hearing testimony into evidence.

In any event, even if the admission of the victim’s preliminary hearing testimony violated the appellant’s right to confrontation, the error was harmless. See State v. Maclin, 183 S.W.3d 335, 352 (Tenn. 2006) (providing that violations of the Confrontation Clause are subject to harmless error review). A police officer testified at trial that he spoke with the victim soon after the robbery. Without any objection from the defense, the officer testified about the victim’s version of the crime. The evidence at trial also established that less than two hours after the robbery, the appellant was arrested with over thirteen hundred dollars in his pocket, including twelve one-hundred-dollar bills. He later admitted to officers that he robbed and cut the victim. Thus, we conclude that any error in admitting the victim’s preliminary hearing testimony into evidence was harmless beyond a reasonable doubt.

III. Conclusion

Based upon the record and the parties’ briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE